Office - Supreme Court, U.S.
FILED
JAN 11 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1028

In the Supreme Court of the United States

October Term, 1983

Dr. James P. McNeil,

Petitioner,

vs.

Michael G. Rafton, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

WALTER R. ALLAN
Counsel of Record
WILLIAM I. EDLUND
225 Bush Street
Mailing Address
P.O. Box 7880
San Francisco, CA 94120
Telephone: (415) 983-1000

PILLSBURY, MADISON & SUTRO
225 Bush Street
Mailing Address
P.O. Box 7880
San Francisco, CA 94120

Attorneys for Respondents Carlisle, Davis, Foster, King, Koregelos, Mellis, Herbert, Central Banking System, Inc., and Pillsbury, Madison & Sutro

(Appearances Continued)

BARTKO, WELSH & TARRANT
A Professional
Corporation
One Maritime Plaza,
Suite 1440
San Francisco, CA 94111
Telephone: (415) 956-1900

JOHN J. BARTKO
One Maritime Plaza,
Suite 1440
San Francisco, CA 94111
Telephone: (415) 956-1900

Attorney for Respondent
Michael J. Rafton

Of Counsel

TABLE OF CONTENTS

	Page
Opinion below	2
Question presented	2
Statement of the case	3
Argument	5
I. The Court of Appeals correctly stated the governing principles of law	5
II. The Court of Appeals correctly applied the governing principles of law	8
Conclusion	12

TABLE OF AUTHORITIES

Cases	Pages
Berger v. United States, 255 U.S. 22 ...	7, 9
Bradley v. Milliken, 620 F.2d 1143	7, 9
Griffith v. Edwards, 493 F.2d 495	9
Hodgson v. Liquor Salesmen's U. Loc. No. 2 of State of N.Y., 444 F.2d 1344	9
In re International Business Machines Corp., 618 F.2d 923	7, 10
International Business Machines Corp., In re, 618 F.2d 923	7, 10
Pfizer, Inc. v. Lord, 456 F.2d 532	7
Phillips v. Joint Legislative Com., etc., 637 F.2d 1014	7
Potashnick v. Port City Const. Co., 609 F.2d 1101	11
Roberts v. Bailar, 625 F.2d 125	11
United States v. Grinnell Corp., 384 U.S. 563	7, 9
United States v. Haldeman, 559 F.2d 31	7, 9, 10, 11
United States v. Mitchell, 377 F.Supp. 1312	11
United States v. Phillips, 664 F.2d 971	9

Statutes	Pages
28 U.S.C.	
Section 144	2
Section 455(a)	2
Section 455 (b)(1)	2

No. 83-1028

In the Supreme Court of the

United States

October Term, 1983

Dr. James P. McNeil,

Petitioner,

vs.

Michael G. Rafton, et al.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

OPINION BELOW

The memorandum opinion of the Court of Appeals is unpublished.[1] A copy of the opinion (cited hereinafter as "Op.") is attached to the Petition.

QUESTION PRESENTED

The only question presented is: Did the Court of Appeals correctly apply the well established principles of law governing recusal under 28 U.S.C. §§ 144, 455(a) and 455(b)(1)? Contrary to petitioner's statement of the question (Pet., pp. 2-3), the declarations before the district court do not state facts showing either "actual impropriety" or "the judge's bias" against a party or in favor of another party.

---

1 Therefore, it is not regarded as precedent, and it is not to be cited as authority (Rules of the United States Court of Appeals for the Ninth Circuit, Rule 21(c)).

STATEMENT OF THE CASE

The issue presented by the petition is one of disqualification. We therefore shall not burden the Court by replying to the petition's several assertions of alleged misconduct by respondents.[2]

The pertinent portions of petitioner's declarations are set forth in the petition (pp. 8-11) and in the opinion of the Court of Appeals (Op., pp. 2-4). After consideration of the declarations and petitioner's arguments, the Court of Appeals (Chief Judge Browning and Circuit Judges Skopil and Norris) affirmed the district judge's denial of the motion to disqualify himself. Contrary to petitioner's

---

2 For example, there are no facts to support the claim that respondents offered a bribe to a former general counsel of the corporate respondent or that the alleged bribe was "under the aegis of the law firm of Pillsbury, Madison & Sutro" (Pet., p. 6). Our failure to comment upon other irrelevant assertions of wrongdoing in the petition should not be taken as acquiescence therein.

assertions (pp. 12, 26-27), the Court of Appeals did not "isolate" petitioner's allegations. Rather, the Court carefully examined the declarations and the asserted facts contained therein, and it found the declarations inadequate (Op., pp. 5-9). In concluding its opinion, the Court noted that at the hearing on the motion for recusal,

> "* * * the judge expressed his high regard for lawyers generally, admonished both parties 'to practice law without calling each other names,' acknowledged [petitioner's] counsel's good faith, and reprimanded one of the [respondent] law firm's lawyers for questioning [petitioner's] counsel's integrity. While the judge's remarks can fairly be said to evidence a strong judicial skepticism towards claims of lawyer misconduct generally, they do not suggest an absolute prejudgment * * * nor the

influence of a personal relationship" (Op., p. 9).

ARGUMENT

Petitioner does not, as he cannot, contend that this case involves any conflict of decisions or any important question of law. The Court of Appeals correctly stated the well-established and controlling principles of law, as enunciated by this Court and other Courts of Appeals. Petitioner's only complaint is that the Court of Appeals "misapplied" those principles. That complaint presents no question meriting review by this Court and, in any event, it is incorrect.

I. THE COURT OF APPEALS CORRECTLY STATED THE GOVERNING PRINCIPLES OF LAW.

A comparison of the petition and the opinion of the Court of Appeals shows that no

issue is presented as to the legal standards which govern in this case. The applicable rules are:

(1) The factual allegations made by petitioner's counsel in his declaration must be taken as true (Pet., p. 12; Op., p. 5);[3]

(2) The question to be determined is neither the moving party's subjective feelings nor the judge's own knowledge of his state of mind but rather whether it could reasonably be concluded from the facts alleged that the judge's impartiality might be questioned (Pet., pp. 29-30; Op., p. 5); and

---

3 The petition also relies upon a declaration filed by petitioner himself which contains nothing more than a hearsay repetition of things told to petitioner by his attorney.

(3) The bias shown must be personal against the moving party or in favor of another party, and it must be extrajudicial, i.e., the conduct complained of must not have arisen from a judicial proceeding (Pet., p. 36; Op., p. 7).

These controlling rules have been recognized and applied on numerous occasions by this Court and by the Courts of Appeals (e.g., United States v. Grinnell Corp. (1966) 384 U.S. 563, 580-583; Berger v. United States (1921) 255 U.S. 22, 34-35; Phillips v. Joint Legislative Com., etc. (5 Cir. 1981) 637 F.2d 1014, 1019; Bradley v. Milliken (6 Cir. 1980) 620 F.2d 1143, 1156-1158; In re International Business Machines Corp. (2 Cir. 1980) 618 F.2d 923, 928-932; United States v. Haldeman (D.C.Cir. 1976) 559 F.2d 31, 129-139; Pfizer, Inc. v. Lord (8 Cir. 1972) 456 F.2d 532, 537-544). Thus, no conflict exists, and the petition presents no important question of law.

II. THE COURT OF APPEALS CORRECTLY APPLIED THE GOVERNING PRINCIPLES OF LAW.

The petition addresses only one complaint: namely, that the Court of Appeals assertedly did not correctly apply the relevant standards. Even this limited complaint, which could not possibly provide reason for this Court's review, is incorrect.

Petitioner places his main reliance upon a supposed "threat" by the district court to disbar his attorney and to impose penalties and upon an asserted "affinity" of the district judge with the other parties' attorneys (Pet., pp. 8, 9, 13, 24, 26, 28, 32, 36-37). However, an examination of petitioner's attorney's declaration shows that these are counsel's characterizations and conclusions, unsupported by any facts (see Pet., p. 9, ¶ 14). It is uniformly agreed that such conclusions, unsupported by facts, are insufficient to show bias

(Berger v. United States (1921) 255 U.S. 22, 33-34; United States v. Haldeman (D.C.Cir. 1976) 559 F.2d 31, 134; Griffith v. Edwards (8 Cir. 1974) 493 F.2d 495, 496; Hodgson v. Liquor Salesmen's U. Loc. No. 2 of State of N.Y. (2 Cir. 1971) 444 F.2d 1344, 1348).

The most that can reasonably be drawn from the alleged facts stated in the declaration is that the district judge believed in strict enforcement of Rule 11 of the Federal Rules of Civil Procedure and that he had a skeptical view of claims against attorneys generally. This is plainly not prejudice against or for a party. Moreover, because the comments arose from and were directly related to the judicial proceeding itself, they were not extrajudicial. Accordingly, they afford no basis for disqualification on the ground of bias (United States v. Grinnell Corp. (1966) 384 U.S. 563, 583; United States v. Phillips (5 Cir. 1981) 664 F.2d 971, 1002; Bradley v. Milliken (6 Cir. 1980) 620 F.2d 1143, 1157; In

re International Business Machines Corp. (2 Cir. 1980) 618 F.2d 923, 927-928; United States v. Haldeman (D.C.Cir. 1976) 559 F.2d 31, 132-133).

The remainder of the factual assertions relied upon by petitioner, as opposed to unjustified conclusions unsupported by facts, border on the frivolous. A discussion of "some alumni affairs" (Pet., pp. 8, 28) is patently innocuous and certainly supports no inference of bias. Nor can anything adverse be drawn from the judge's comments about his acquaintance in general with San Francisco attorneys (see Pet., p. 38; Op., p. 4). The judge was simply observing that such acquaintance should not be grounds for disqualification, a view shared by other courts:

> "If such social contacts between judges and members of the bar were to form a basis for recusal, then judges would either become near social hermits or we would be left with a

non-functioning judiciary" (United States v. Mitchell (D.D.C. 1974) 377 F.Supp. 1312, 1323, affirmed United States v. Haldeman (D.C.Cir. 1976) 559 F.2d 31).

Cases cited by petitioner demonstrate the nature of the facts required to support a motion for disqualification. For example, Roberts v. Bailar (6 Cir. 1980) 625 F.2d 125 (Pet., p. 22) was a sex discrimination case in which the trial judge had remarked that he knew the individual defendant to be an honorable man who would never intentionally discriminate against anybody. And in Potashnick v. Port City Const. Co. (5 Cir. 1980) 609 F.2d 1101 (Pet., p. 9) the judge had been a participant in business ventures with the attorney for the prevailing party, that attorney had represented the judge in several unrelated matters, and the attorney was a member of the same firm in which the judge's father was a partner. Facts such as these are totally absent in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

WALTER R. ALLAN

Counsel of Record

WILLIAM I. EDLUND

Attorneys for Respondents Carlisle, Davis, Foster, King, Koregelos, Mellis, Herbert, Central Banking System, Inc., and Pillsbury, Madison & Sutro

JOHN J. BARTKO

Attorney for Respondent Michael J. Rafton

PILLSBURY, MADISON & SUTRO

BARTKO, WELSH & TARRANT

Of Counsel